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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1930

BOSTON PRESSED METAL COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 8) is reported in 42 F. (2d) 312.

JURISDICTION

The judgment of the Court of Claims was rendered June 2, 1930. (R. 10.) Petition for certiorari was filed August 8, 1930. Certiorari was granted October 20, 1930. (R. 11.) Jurisdiction is conferred on this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The general question involved is: Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor had expired,

does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

If this question should be answered in the affirmative, this additional question is presented: Whether Section 611 should be construed to apply to a collection of a tax by a credit of an admitted overpayment by the taxpayer for another year.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 7–8.

STATEMENT

On March 30, 1918, the petitioner filed its income and excess profits tax return for the calendar year 1917 and during the same year paid the tax shown thereon. (R. 6.) On January 7, 1921, the Commissioner of Internal Revenue assessed an additional tax for the year 1917 in the amount of $6,277.77. On February 24, 1921, the petitioner filed a claim for the abatement of this amount and the abatement of an assessment for the year 1918. On January 7, 1925, the Commissioner acted on the claim in abatement and abated the assessment for 1918 in part and rejected the claim in abatement for 1917, and on the same date applied $3,844.94 of the amount theretofore paid for 1918 as a credit against the outstanding 1917 assessment. The five-year period for the collection of 1917 tax expired on March 30, 1923. The credit of the 1918 overpayment was thus made at a time when the period for the collection of 1917 tax had expired.

The taxpayer filed a claim for refund which was rejected. (R. 7.) Suit was instituted March 27, 1929. (R. 3.) The Government defended on the ground that the credit constituted a payment out of time, the recovery of which was barred by Section 611 of the Revenue Act of 1928.

SUMMARY OF ARGUMENT

The applicable provisions of the Revenue Acts require the Commissioner of Internal Revenue to apply determined overpayments as credits against unpaid assessments. The statute of limitations against collections applies to credits so made. Section 609 (b) of the Revenue Act of 1928 declares credits to be void if a payment at the particular time would be an overpayment, within the meaning of Section 607, which section authorizes refund of payments made out of time. But Section 611 is a limitation on Section 607. Whether the application of a credit is void under Section 609 (b) can be determined only by applying Section 611 as a limitation on Section 607.

ARGUMENT

In *Graham and Foster* v. *Goodcell*, No. 36, current term, the brief for respondent fully presents the question of the effect of Section 611 of the Revenue Act of 1928 (*infra*, *p.* 7). We contend that Section 611 operates to prevent recovery of taxes sued for in the instant case. The distinctions between that case and this are as follows:

(1) In that case the suit was against the Collector; here it is against the Government. (2) In that case

the claim in abatement was acted upon before collection was barred; here the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the passage of the Revenue Act of 1928, which repealed Section 1106 (a). (4) In that case the tax was collected by a payment from the taxpayer to the Collector; in this case the collection was by the application of an overpayment for another year which was applied by the Commissioner as a credit against the unpaid assessment for the year involved.

The first three distinctions are all present in *Magee* v. *United States*, No. 65, current term, and they are discussed in the Government's brief in that case. The present case will be controlled by the decision in the *Magee* case unless the payment of the tax by a credit is a controlling distinction. The language of Sections 607, 609, and 611 affords no indication that Section 611 was not intended to apply to collections made by credits. The court below so construed the sections and held that Section 611, so construed, was constitutional.

The taxpayer in this case had overpaid its tax for the year 1918 and the Commissioner of Internal Revenue so found and declared. The Commissioner did not repay the sum here involved to the taxpayer but, pursuant to the power given him by the Revenue Act then in effect (Section 281, Revenue Act of 1924),

applied that sum in liquidation of an outstanding assessment for the year 1917. The taxpayer brought suit for the recovery of this sum on the ground that it had been determined by the Commissioner to be an overpayment for the year 1918. Application of a credit against an assessment at a time when collection is barred has been held to amount to an erroneous collection. *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D. Ohio). By Sections 607, 609, and 611 of the Revenue Act of 1928, Congress has established the status of such credits. Section 609 (a) of the Revenue Act of 1928 (*infra*, p. 7) provides "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607." Section 607 of the Revenue Act of 1928 (*infra*, p. 7) provides that a tax paid after the period of limitations for collection shall be an overpayment and refunded to the taxpayer upon timely claim. But Section 611 of that Act (*infra*, p. 7) provides that a payment shall not be considered an overpayment under the provisions of Section 607 if claim in abatement was filed and collection stayed.

The application of the credit in the present case is not therefore void under Section 609 (a), as payment at that time would not have been an overpayment within the meaning of Section 607 as limited by Section 611. As the application of the credit was not void under Section 609 (a), it constitutes a payment coming within the operation of Section 611. These three sections, properly construed, evidence an intention on the part of Congress to treat collections

and credits of taxes out of time on the same basis. No decision contrary to our contention has come to our attention.

In *Graham and Foster* v. *Goodcell*, No. 36, present term, we have argued that Section 611 should be construed to prevent recovery of payments falling thereunder and that, so construed, it is constitutional. Section 611, construed to deny recovery for a credit made, would likewise be constitutional.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C., Sup. III, Title 26, Secs. 2607, 2609, 2611), provides in part as follows:

> SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
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> * * * * *
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> Sec. 609. ERRONEOUS CREDITS.—(*a*) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.
>
> (*b*) Credit of barred overpayment.—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.
>
> (*c*) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this act.
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> * * * * *
>
> SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period

of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

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